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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1545

EVERETT C. MCKETHAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner Everett C. McKethan respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, as revised, has not yet been reported officially. It is reprinted in the Appendix to this petition at page 1a.

A related case, *United States v. Calvin W. West*, Nos. 76-1837 through 76-1843 (4th Cir., February 13, 1978), is reprinted in the Appendix to this petition at page 15a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered February 17, 1978. Upon consideration of a Petition for Rehearing, the Court of Appeals revised its opinion pursuant to its Order filed March 30, 1978. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTION PRESENTED

WHETHER, IN LIGHT OF THE CONFRONTATION CLAUSE AND UNDER THE FEDERAL RULES OF EVIDENCE, THE GRAND JURY TESTIMONY OF A GOVERNMENT WITNESS WHO REFUSES TO TESTIFY OR BE CROSS-EXAMINED AT TRIAL MAY BE INTRODUCED IN EVIDENCE WHERE SUCH TESTIMONY IS THE ONLY EVIDENCE OF CRIMINALITY PRESENTED AGAINST THE DEFENDANT.

CONSTITUTIONAL PROVISION and STATUTE INVOLVED

Amend. VI, U.S. Const.

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him;

Federal Rules of Evidence
Rule 804

HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

(a) *Definition of unavailability.* "Unavailability as a witness" includes situations in which the declarant –

* * *

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;

* * *

(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

* * *

(5) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence

which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

STATEMENT OF THE CASE

After a trial by jury in the United States District Court for the Eastern District of Virginia, Everett C. McKethan was convicted of narcotics conspiracy, §21 U.S.C. §963, and a violation of the Travel Act, 18 U.S.C. §1952. On November 17, 1976, he was sentenced to consecutive terms of five years and one year for these convictions. The indictment charging McKethan with narcotics conspiracy also named Earl A. Garner as a defendant and co-conspirator, and McKethan and Garner were tried together. The jury convicted Garner, along with McKethan, of conspiracy to import heroin, and in addition, Garner was convicted of a second conspiracy charge and a substantive count of narcotics importation. The indictment had named Warren Robinson as a co-conspirator with McKethan and Garner. Upon Robinson's refusal to testify as a government witness at trial, the trial judge allowed the government to use his grand jury testimony as substantive evidence. The admissibility of that evidence was the entire focus of the trial, and is the basis of this petition.

The conspiracy charged in the indictment involved, essentially, the importation of heroin from Western Europe to Washington, D.C. Before the indictment was issued, Robinson testified before the grand jury on January 7, 1976 pursuant to a plea bargaining agreement with the government. In return for his cooperation with the government's efforts to prosecute McKethan and others, Robinson was allowed to enter guilty pleas to lesser offenses, thus minimizing his exposure to lengthy prison terms for more serious drug charges. In his testimony before the grand jury, Robinson said that McKethan put him in contact with a source of heroin in Amsterdam and that later, McKethan gave advice to Garner concerning avoidance of customs inspections for smuggling heroin out of Europe.

Robinson also testified in the grand jury about trips to Europe which he, Garner and others made during which he and the others purchased drugs and returned with them to the United States. Robinson did not tell the grand jury that McKethan purchased heroin, smuggled it out of Europe or distributed it in the United States; McKethan was, according to Robinson, strictly the information source of a conspiracy which Robinson and others carried out. Robinson's testimony also indicated that McKethan was able to play this role because as an airline employee, he travelled frequently to Europe.

At the trial, Robinson was the only witness the government had who could potentially implicate McKethan in the series of events described in Robinson's grand jury testimony. But prior to his making an opening statement, the government prosecutor notified the trial judge that Robinson was "reluctant" to testify. The government therefore called Robinson for questioning outside the presence of the jury and after he identified himself, Robinson refused to testify. Despite that refusal, the

government prosecutor told the jury in his opening statement that Robinson would testify, and he summarized for the jury Robinson's grand jury testimony. Again, Robinson was brought before the court out of the presence of the jury and again, after identifying McKethan and Garner, Robinson continued to refuse to testify. The trial judge granted Robinson immunity, ordered him to testify, threatened him with severe punishment, and ultimately found him in contempt of court, but Robinson continued to refuse to testify.

When it was clear that Robinson's refusal to cooperate with the government would continue, the trial judge suggested that the government offer Robinson's grand jury testimony as evidence under Rule 804(b)(5) of the Federal Rules of Evidence, the residual exception to the hearsay rule applicable to statements of unavailable witnesses. The trial judge recognized that, by its terms, Rule 804 (b)(5) could be employed only if the government had given notice to the defendants prior to trial of its intent to use the hearsay evidence. The judge concluded, however, that the notice requirement could be dispensed with if the hearsay were offered on the second day of trial. When Robinson persisted in refusing to testify on the second day of trial, the evidence was offered by the government, and admitted in evidence by the judge.

Robinson's grand jury testimony contained all of the evidentiary infirmities common to testimony taken in an *ex parte* context, including leading questions, multiple hearsay, unintelligible and unresponsive answers, and questions calling for an answer for which no foundation had been laid. When specific objections were made on these grounds, however, the trial judge sustained only one objection to the admissibility of the testimony. The trial judge made no inquiry into the reliability of the testimony, deciding instead to admit it because it was given

under oath. Robinson's grand jury testimony was thus read to the jury in the form in which it was transcribed.

Then the trial judge ordered that Robinson be brought before the jury for "cross-examination" on his grand jury testimony. Robinson continued to refuse to answer questions propounded to him by defense counsel, except to say that his grand jury testimony was inaccurate. The Court of Appeals observed of this "cross-examination" did not meet the requirements of the Confrontation Clause. *Infra* at 12a.

In a split decision, the Court of Appeals upheld McKethan's conviction despite his objection to the admissibility of Robinson's grand jury testimony under both the Confrontation Clause of the sixth amendment and the Federal Rules of Evidence. As noted, the Court of Appeals did not find that Robinson had been cross-examined. The rule of law it announced was that the admission of grand jury testimony does not violate the Confrontation Clause "if it bears sufficient guarantees of reliability and the circumstances contain a sufficient basis upon which the jury may assess its trustworthiness." *Infra* at 7a.

In its appellate analysis, the Court of Appeals found Robinson's grand jury testimony admissible as to McKethan because it was corroborated by documentary evidence introduced at trial by the government which tended to show that McKethan had indeed travelled to Europe as Robinson had said he did.[1] The majority

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[1] The opinion of Court of Appeals does not make this clear, but Robinson's grand jury testimony was the only evidence of criminal conduct presented as to McKethan. Another government witness named Mary Ann McKee testified as to Garner, but she did not even know who McKethan was. Similarly, five other persons who were alleged by the indictment to be McKethan's co-conspirators were called as defense witnesses, and none of them could identify McKethan.

opinion of the Court of Appeals thus ruled that grand jury testimony is admissible hearsay under Rule 804(b)(5) and is not barred by the Confrontation Clause if other evidence shows it to be reliable. The Court of Appeals found the grand jury testimony reliable, and therefore admissible, as to McKethan solely because the documentary evidence corroborated Robinson's testimony that McKethan had travelled abroad; the corroborative travel records themselves are, of course, devoid of any inference of wrongdoing.

REASONS FOR GRANTING THE WRIT

Judge Widener dissented from the opinion of the majority of the Court of Appeals for the reasons expressed in his dissent in the related case of *United States v. West*, ___F.2d___ (4th Cir., February 13, 1978). *Infra* at 15a. That dissent, in discussing several of the considerations listed in Rule 19 of the Rules of this Court, is virtually a brief on behalf of McKethan for the issuance by this Court of a writ of certiorari. *Infra* at 30a-36a.

The Court of Appeals decision below should be reviewed because it is in direct conflict with a Second Circuit decision concerning the use of grand jury testimony in light of the Confrontation Clause. *United States v. Fiore*, 443 F.2d 112 (2d Cir. 1971). Further, as to the admissibility of grand jury testimony under the Federal Rules of Evidence, the Court of Appeals decision is in conflict with *United States v. Gonzales*, 559 F.2d 1271 (5th Cir. 1977) from the Fifth Circuit, and is not in complete harmony with *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977) from the Eighth Circuit. Also, the decision conflicts with the standards established by this Court for the admission of former testimony which has not been cross-examined,

and of hearsay evidence generally when confrontation is absent. *Dutton v. Evans*, 400 U.S. 74 (1970).

In addition, wholly apart from the fact that the Court of Appeals decision conflicts with the decisions of other courts of appeal and this Court, the specific question presented by this petition involves an important issue under the Federal Rules of Evidence which has not been addressed by this Court. That question – the admissibility of grand jury testimony as substantive evidence in a criminal trial – intersects with the constitutional right to not be tried by affidavit, as guaranteed by the sixth amendment.

For all of those reasons, the issuance of a writ to review the Court of Appeals decision is appropriate here.

A. The Circuits Are In Conflict On The Admissibility of Grand Jury Testimony Under The Confrontation Clause.

In *United States v. West, infra* at 15a, the Court of Appeals decided that the grand jury testimony of a witness who had been murdered before he could testify at the defendants' trial was admissible. In McKethan's case, the grand jury testimony of the witness Robinson who refused to testify at trial was admitted in evidence. Where a witness refused to testify and the admissibility of his grand jury testimony was challenged as substantive evidence on constitutional grounds, the Second Circuit barred the use of grand jury testimony since its admission would violate the Confrontation Clause. *United States v. Fiore*, 443 F.2d 112, 115 (2d Cir. 1971). Judge Widener's dissent in *West* points out that by equating the Constitution's regulation of trial procedure with rules of evidence, the majority opinion puts the Fourth Circuit in conflict with *Fiore*. *Infra* at 35a. Clearly, the court below

gave no separate consideration to the confrontation issue on which *Fiore* turned, deciding instead both here and in *West* that the question of admissibility is the same under Rule 804(b)(5) and under the Confrontation Clause. For that reason, as Judge Widener has observed, the decision below is in direct conflict with the Second Circuit's opinion in *Fiore* on the constitutional issue of the Confrontation Clause.

B. The Opinion Below Is In Conflict With Decisions From The Fifth And Eighth Circuit On The Admissibility Of Grand Jury Testimony Under Rule 804(b)(5).

In equating the question of admissibility under the rules of evidence with admissibility under the Confrontation Clause, the opinion below is also in conflict with *United States v. Carlson*, 547 F.2d 1348 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). In *Carlson*, the Eighth Circuit ruled that grand jury testimony was admissible under Rule 804(b)(5) where it had a high degree of trustworthiness. 547 F.2d at 1347. However, the *Carlson* court also assumed that the defendant had confrontation rights apart from the reliability of the hearsay testimony under the Rules of Evidence, but that the defendant had waived such rights by threatening the witness who then refused to testify. 547 F.2d at 1357-60. By contrast, under the opinion below of the Court of Appeals, only the question of reliability is addressed, not the issue of whether confrontation occurred, a separate question which the *Carlson* court recognized but did not decide.

Carlson did find, however, that the grand jury testimony of an unavailable witness was admissible under the Rules of Evidence if such testimony could be found to be reliable. In conflict with *Carlson* and with the instant

case, the Fifth Circuit opinion in *United States v. Gonzales*, 559 F.2d 1271 (5th Cir. 1977) held that a witness' grand jury testimony could not be considered "reliable". The *Gonzales* court found the grand jury testimony unreliable because, as in McKethan's case, the witness' answers were given to impermissible leading questions and his answers not cross-examined; also, the *Gonzales* witness, like Robinson, refused to affirm at trial that his testimony before the grand jury was true. In both its result and its rationale, the opinion of the Fifth Circuit in *Gonzales* is in conflict with the instant case.

C. The Opinion Below Ignores This Court's Decisions Concerning The Requirement That There Be Cross-Examination of Former Testimony, And Misapplies *Dutton v. Evans* by Permitting The Admission Of A Paper Transcript.

Where the government has attempted to introduce a witness' former testimony, this Court's decisions have focused upon the accused's rights to cross-examine that testimony.[2] Similarly, Rule 804(b)(1), expressly applicable to "former testimony", requires that there be an opportunity to examine the witness on such testimony when it is offered, and thus in effect codifies the rationale of this Court's opinions. Even though Robinson's grand jury testimony was former testimony, the opinion below of the Court of Appeals did not require that cross-

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[2] California v. Green, 399 U.S. 149, 170 (1970); Barber v. Page, 390 U.S. 719, 725-26 (1968); Pointer v. Texas, 380 U.S. 400, 407 (1965); Mattox v. United States, 156 U.S. 237, 243-44 (1895).

examination is mandated by this Court's decisions or by Rule 804(b)(1), although it found that there was not adequate cross-examination to satisfy the requirements of the Confrontation Clause. *Infra* at 12a. The opinion of the Court of Appeals conflicts with this Court's prior decisions recognizing the importance of cross-examination to the admission of former testimony.

Judge Widener's dissent in *West* emphasizes that under the Confrontation Clause, the question is not whether the testimony is truthful; rather, the issue is whether there has been adequate confrontation to satisfy the sixth amendment. *Infra* at 32a. Similarly, when ruling upon the admissibility of former testimony rather than other kinds of hearsay, this Court's decisions have considered whether cross-examination has occurred at some point. *See, e.g., California v. Green,* 399 U.S. 149, 165 (1970). But here, the court below reaches out purportedly to apply the standard this Court established in *Dutton v. Evans,* 400 U.S. 74 (1970) to assess the admissibility of hearsay which was not former testimony. In *Dutton,* this Court approved the admission of a hearsay statement of one of twenty prosecution witnesses, which was a one sentence conversation about a defendant and on which the witness was "vigorously and effectively cross-examined by defense counsel." 400 U.S. at 87. In making its ruling in *Dutton,* this Court pointedly explained that this bit of evidence did not violate the defendant's right to confrontation, not only because it had "indicia of reliability", but expressly because "It does not involve the use by the prosecution of a paper transcript. . . ." *Id.* By purportedly applying the standard used in *Dutton* to the "paper transcript" at issue in the instant case, the Court of Appeals decision is in conflict with *Dutton* itself, and ought to be reviewed for that reason.

D. The Legislative History Of Rule 804(b)(5) Does Not Contemplate Its Use For The Introduction Of Grand Jury Testimony, Or For Radically Altering The Function Of Grand Jury Testimony.

Wholly apart from the conflict of the opinion of the court below with the decisions of other courts of appeal and with this Court, the judgment appealed from should be reviewed by this Court because of the importance of the federal question involved here.

The decision of the Court of Appeals to admit grand jury testimony under the residual exception to Rule 804, the rule applicable to hearsay of unavailable witnesses, constitutes a dramatic departure from the historic function of grand jury testimony. Under the Court of Appeals decision, grand jury testimony can be used by the government as substantive evidence in a criminal case if a witness is unavailable for any of the reasons catalogued in Rule 804(a).

At a minimum, it would seem that the legislative history of the Federal Rules of Evidence would contain some discussion of the enhanced function of grand jury testimony if Congress intended Rule 804(b)(5) to alter the historic function of such testimony. There is no discussion at all in the legislative history of the Rules of such a radical use of the residual hearsay exception.[3] Instead, the express purpose of Rule 804(b)(5) was to establish a method under which trial judges in exceptional circumstances could admit hearsay that did not fall under recognized common law exceptions to the hearsay rule. S. Rep. No. 93-1277, 93d Cong., 2d Sess. 19-20

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[3] *See* S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974); H.R. Rep. No. 93-1597, 93d Cong., 2d Sess. (1974); H.R. Rep. No. 93-650, 93d Cong., 1st Sess. (1973).

(1974). The instant petition thus involves an important question of federal law which this Court should consider.

CONCLUSION

For the foregoing reasons, petitioner submits that this petition for a writ of certiorari should be granted, and that the judgment of the United States Court of Appeals for the Fourth Circuit be reversed.

Respectfully submitted,

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